

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BRIAN ASHLEY WHITFIELD,	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 2:11-CV-256-RSP
	§	
FRANKIE THOMAS, <i>et al.</i> ,	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Currently before the Court are two motions to dismiss in this matter. First, on August 1, 2011, defendant Frankie Thomas moved for dismissal under Rule 12(b)(6) for failure to state a claim. (Dkt. 20). As recognized by movant, his burden is to show that the complaint does not contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007). This Court finds that defendant cannot meet that burden on this record. Plaintiff alleges sufficient facts to state a claim. Accordingly, that motion is DENIED.

Second, on January 4, 2012, defendant John Kelley moved for dismissal under Rule 4(m) for failure to make service of a summons and complaint upon Kelley within 120 days after Kelley was joined by the Amended Complaint filed on July 26, 2011. (Dkt. 34). The record reflects that the Clerk issued a summons for Kelley on August 9, 2011, but there is no evidence it was ever served. While plaintiff is proceeding *pro se*, the record does reflect that plaintiff made service upon defendant Thomas after the initial Complaint was filed, thus showing that he is familiar with his obligation of service and knows how to accomplish it. Plaintiff has not

responded to the motion in any way. Accordingly, the motion (Dkt. 34) is GRANTED, and all claims against defendant John Kelley are dismissed without prejudice.

SIGNED this 29th day of February, 2012.



ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE